

2002

# State of Utah v. Jose Daniel Robinson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellant, :  
v. : Case No. 20020027-CA  
JOSE DANIEL ROBINSON, :  
Defendant/Appellee. :

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BRIEF OF APPELLANT

- - - - -  
APPEAL FROM A FINAL ORDER DISMISSING ONE  
COUNT OF MANSLAUGHTER, A SECOND DEGREE  
FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-  
5-205 (1999), IN THE FOURTH JUDICIAL DISTRICT  
COURT IN AND FOR UTAH COUNTY, THE HONORABLE  
GARY D. STOTT, PRESIDING

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FILED  
Utah Court of Appeals  
JUL 29 2002  
Paulette Stagg  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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State of Utah,	)	
	)	ORDER
Plaintiff and Appellant,	)	
	)	Appellate Case No. 20020027-CA
v.	)	
	)	
Jose Daniel Robinson,	)	
	)	
Defendant and Appellee.	)	

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Before Judges Davis, Greenwood, and Orme

By reason of the failure of appellee to file appellee's brief within the time permitted by Utah R. App. P. 26(a), which time expired on June 26, 2002, IT IS HEREBY ORDERED that the case will be submitted to the court on appellant's brief only; provided, however, that if appellee's brief is submitted within seven (7) days from the date hereof, such brief will be accepted for submission without further order of the court.

Dated this 29<sup>th</sup> day of July, 2002.

FOR THE COURT:

  
\_\_\_\_\_  
James Z. Davis, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 29<sup>th</sup> day of July, 2002, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

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Dated this 29<sup>th</sup> day of July, 2002.

By Janet Alexander  
Janet Alexander  
Deputy Clerk

Case No.: 20020027-CA  
FOURTH DISTRICT, PROVO DEPT, #001403840

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	Case No. 20020027-CA
JOSE DANIEL ROBINSON,	:	
Defendant/Appellee.	:	

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BRIEF OF APPELLANT

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order dismissing one count of manslaughter, a second degree felony. This Court has jurisdiction over the case pursuant to Utah Code Ann. § 78-2a-3(2)(e)(1996).

STATEMENT OF THE ISSUE ON APPEAL AND

STANDARD OF APPELLATE REVIEW

Did the magistrate err when it dismissed the manslaughter charge against defendant after the state adduced sufficient evidence at the preliminary hearing to support a reasonable belief that he acted recklessly in retrieving, handling, and discharging a loaded handgun while under the influence of alcohol?

Whether to bind a defendant over for trial on a criminal charge presents a question of law. On appeal, that determination is reviewed for correctness, with no deference accorded the



magistrate's decision. State v. Clark, 2001 UT 9, ¶ 8, 20 P.3d 300 (citing State v. Humphrey, 823 P.2d 464, 465-66 (Utah 1991)).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-5-205, governing manslaughter, provides in pertinent part:

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another[.]

Utah Code Ann. §76-5-205(1)(a)(1999).

Utah Code Ann. § 76-2-103, providing definitions for culpable mental states, provides in pertinent part:

A person engages in conduct:

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Utah Code Ann. §76-2-103(3)(1999).

#### STATEMENT OF THE CASE

Defendant was charged by information with one count of manslaughter (R. 1). After a preliminary hearing, the magistrate dismissed the charge for lack of "probable cause to believe that defendant's actions were reckless" (R. 32-33). This timely

appeal followed (R. 34-35).

STATEMENT OF THE FACTS<sup>1</sup>

On June 9, 2000, defendant came home from work late in the evening and joined his sister-in-law in the living room, where they drank beer and watched television together (R. 36 at 10). At about 1:15 a.m., defendant went to his bedroom and retrieved a .38 handgun that he kept in his closet (Id. at 11). Returning to the living room, defendant handed the gun to his sister-in-law, who was seated on the sofa. He sat down opposite her, about six feet away, on a love seat (Id. at 12).

As his sister-in-law was handling the gun, defendant heard the slide activate. He went over to her, asked for the gun back, and returned to the love seat (Id.). Noticing that the barrel of the gun was protruding slightly and thinking that the weapon might be jammed, defendant pulled the slide back to clear out any obstruction (Id. at 13). As he did so, a round ejected and fell to his feet. Defendant picked up the bullet and put it in the clip (Id.). According to defendant, the gun was either in his hand or resting on his leg at this point. The next thing defendant remembered was that the gun fired. He then looked over towards his sister-in-law and saw her slumped over the arm rest of the couch (Id.). She had been hit in the neck by a bullet

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<sup>1</sup> The facts are recited in the light most favorable to the prosecution. State v. Talbot, 972 P.2d 435, 437-38 (Utah 1999) (citations omitted).

from his gun. She died shortly thereafter from the injury (Id. at 7-8).

#### SUMMARY OF ARGUMENT

The only issue in this case is whether the evidence of defendant's recklessness was sufficient to sustain a bindover on the manslaughter charge.

The probable cause threshold for bindover at a preliminary hearing is not high. The prosecution is charged only with producing a sufficient quantum of evidence "to support a reasonable belief that an offense has been committed and that the defendant committed it." State v. Clark, 2001 UT 9, § 16, 20 P.3d 300 (citation omitted). In assessing whether the evidence established a reasonable belief, the magistrate views all evidence and its reasonable inferences in the light most favorable to the prosecution. State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995) (citation omitted). Because the state's evidence will likely only get stronger between the time of the preliminary hearing and the time of trial, even "close calls" should result in bindover. Id.

The evidence reached this threshold for bindover as a matter of law. The preliminary hearing court had before it evidence that defendant, who had been drinking, retrieved a handgun from his bedroom and gave it to his sister-in-law (R. 36 at 10-11). When he heard the slide activate, he took the gun back (Id. at

12). The evidence also showed that defendant pulled the slide back, ejecting a bullet on the floor. He then consciously replaced the bullet in the clip (Id. at 13). And the evidence showed that the gun subsequently fired, killing the victim (Id. at 7, 13). Under the circumstances, the evidence and fair inferences that could be drawn from it establish at least a reasonable belief that defendant was actually aware of but disregarded a significant risk of harm and that disregarding the risk constituted a gross deviation from what a reasonable person would do. Accordingly, the magistrate erred when it refused to bind the case over for trial.

#### ARGUMENT

THE MAGISTRATE ERRED WHEN IT  
DISMISSED THE MANSLAUGHTER CHARGE  
BECAUSE THE STATE ADDUCED  
SUFFICIENT EVIDENCE AT THE  
PRELIMINARY HEARING TO SUPPORT A  
REASONABLE BELIEF THAT DEFENDANT  
ACTED RECKLESSLY IN RETRIEVING,  
HANDLING, AND DISCHARGING A LOADED  
HANDGUN WHILE UNDER THE INFLUENCE  
OF ALCOHOL

The magistrate in this case refused to bind defendant over on the charge of manslaughter and dismissed the case. In so doing, the magistrate ruled:

Having heard the evidence in this case, this court concludes that, as a matter of law, there is not probable cause that defendant was aware of but consciously disregarded a "substantial and unjustifiable risk" that his conduct might result in the death of another. This court also finds that

any risk which did exist was not of such a nature and degree that its disregard would be a gross deviation from the standard of care that an ordinary person would exercise. Accordingly, this court finds that this matter should be dismissed.

R. 32-33 or addendum A. While the magistrate's ruling states the law of recklessness correctly, it fails to apply that law to the specific facts of the case in light of the quantum of evidence necessary to support a bindover. When the proper standard is applied to the facts, the error in the magistrate's ruling becomes clear.

To bind a defendant over for trial, the prosecution must demonstrate probable cause "by present[ing] sufficient evidence to establish that 'the crime charged has been committed and that the defendant has committed it.'" State v. Pledger, 896 P.2d 1226, 1229 (Utah 1995) (quoting Utah R. Crim. P. 7(h)(2)). The evidence necessary to establish probable cause at this stage of the proceedings is "relatively low because the assumption is that the prosecution's case will only get stronger as the investigation continues." Evans v. State, 963 P.2d 177, 182 (Utah 1998) (citing Pledger, 896 P.2d at 1229). Thus, a preliminary hearing court must bind over for trial whenever the state presents "sufficient evidence to support a reasonable belief that an offense has been committed and that the defendant committed it." State v. Clark, 2001 UT 9, § 16, 20 P.3d 300 (citation omitted) (emphasis added). This is the same quantum of

evidence necessary to support an arrest warrant. Id. The magistrate, in making this determination, "should view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution." Pledger, 896 P.2d at 1229.

In order to establish a reckless mental state, the State had to demonstrate both subjective and objective components of defendant's perception of the risk.<sup>2</sup> State v. Singer, 815 P.2d 1303, 1307 (Utah 1991) (citing State v. Wessendorf, 777 P.2d 523, 525-26 (Utah App. 1989)). First, from a subjective standpoint, the state had to show that defendant was aware of but consciously disregarded a substantial and unjustifiable risk that his conduct could result in the death of another. Utah Code Ann. § 76-2-103(3) (1999); Singer, 815 P.2d at 1307. And second, from an objective standpoint, the State had to show that the risk was of such a nature and degree that disregarding it amounted to a gross deviation from the standard of care an ordinary person in defendant's position would have exercised. Utah Code Ann. § 76-2-103(3); Singer, 815 P.2d at 1307; Wessendorf, 777 P.2d at 526;

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<sup>2</sup> On a continuum of mental states, "recklessness is not marked by a sharp analytical line." State v. Singer, 815 P.2d 1303, 1307 (Utah App. 1991). Whether conduct has crossed over into recklessness is "[i]n essence[,] . . . a matter of judging when conduct is no longer just gray but dark gray." Id. Once the state establishes a reasonable belief that defendant acted recklessly, then the magistrate should bind over, leaving the ultimate determination of whether defendant acted recklessly to the jury. See State v. Petree, 659 P.2d 443, 444 (Utah 1983).

State v Dyer, 671 P.2d 142, 148 (Utah 1983). Measuring the evidence of defendant's conduct against the correct legal standard for a bindover demonstrates the legal error in the magistrate's conclusion that the state failed to produce sufficient evidence to support a reasonable belief that defendant acted recklessly.

First, the evidence reflects that defendant subjectively knew of the specific risks inherent in his conduct. While the gun was in his sister-in-law's possession, defendant heard the slide activate and responded by immediately taking the gun away from her (R. 36 at 12). The fair inference from this conduct is that the sound of the slide activating alerted defendant to an increased risk of serious harm, to which he responded by regaining possession of his weapon (Id.). Defendant also knew, by the bulge in the barrel, that something was mechanically amiss with his gun (Id. at 13). In response, he pulled back the slide and saw a bullet fall out (Id.). He then consciously replaced the bullet in the clip (Id.). At this juncture, he actually knew that the gun contained at least one live round. Indeed, his own volitional act had loaded the gun.

It is reasonable to infer that one who possesses a gun knows that pointing it at another human being in a potentially loaded condition is a risky proposition. In this case, after defendant replaced the bullet in the gun, the gun discharged and hit the

victim in the neck (Id. at 8). The only fair inference from this fact is that the gun, which was in defendant's possession, was pointed at the victim when it discharged.

The evidence also demonstrates that defendant consciously disregarded the risk inherent in playing with guns. The state adduced evidence that defendant had been drinking between 10:30 p.m., when he arrived home from work, and 1:15 a.m., when the shooting occurred (R. 36 at 10-11).<sup>3</sup> After taking the weapon back from his sister-in-law, defendant consciously pulled back the slide and, instead of unloading the gun, chose to reload the magazine, which he then knew contained at least one live round (Id. at 13). Defendant thus disregarded the substantial risk inherent in handling a deadly weapon, which directly resulted in his sister-in-law's death.

Second, the State adduced evidence pointing to the lethal combination of a loaded gun and intoxication. This combination suffices to establish probable cause that defendant's conduct, when viewed objectively, constituted a gross deviation from the standard of care an ordinary person in defendant's position would have exercised. State v. Owens, 638 P.2d 1182, 1184 (Utah 1981) (exploring parameters of "gross deviation" and concluding

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<sup>3</sup> After the shooting, according to the investigating detective, defendant "appeared intoxicated" (R. 36 at 16). A subsequent toxicology report, showing a blood level of .10, confirmed the officer's observation (R. 8).



that the divergence must be "extreme"); State v. Whitehead, 2001 UT App 385 (concluding that defendant's handling of gun in close proximity to others constituted "gross deviation" supporting a finding of recklessness where he knew that his action would load the gun); cf. State v. McPhee, 684 P.2d 57, 58 (Utah 1984) (concluding that the conduct of defendant, who drank half a bottle of vodka, drove, and subsequently killed a child on a bicycle, constituted a "gross deviation from the standard of care that an ordinary prudent person would indulge").

Under the record facts of this case, because the magistrate had sufficient evidence before it to establish probable cause that defendant acted recklessly, it should have bound defendant over for trial and left adjudication of the merits to the trier of fact.

#### CONCLUSION

For the reasons stated, this Court should reverse the magistrate's order dismissing the case and order that defendant be bound over for trial on one count of manslaughter, a second degree felony.

RESPECTFULLY submitted this 24<sup>th</sup> day of May, 2002.

MARK L. SHURTLEFF  
Attorney General



JOANNE C. SLOTNIK  
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellant were mailed first-class, postage prepaid, to Sheldon Carter, attorney for appellee, 3325 North University Avenue, #200, Provo, Utah 84604, this 24<sup>th</sup> day of May, 2002.

Jeanne C. Slotnick

## Addendum A

12/3/01 K8

**IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH**

<b>STATE OF UTAH</b>  Plaintiff,  -vs-  <b>JOSE DANIEL ROBINSON</b>  Defendant(s).	<b>ORDER DISMISSING CASE</b>  Case No. 001403840  JUDGE: GARY D. STOTT
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This is a prosecution for Manslaughter, a Second Degree Felony in violation of UCA 76-5-205. On September 6, 2001, this matter came on for a preliminary hearing. At that hearing the following facts were established:

On or about June 10, 2001, defendant was at home with the his sister-in-law, the victim, Christina Galbraith. Both defendant and the victim were drinking. At some point during the evening, defendant retrieved a .380 semiautomatic pistol and showed it to the victim. After the victim handled the gun, defendant took the gun and cocked it by pulling back on the slide.

When defendant pulled back the slide on the gun, a bullet was ejected and fell on the carpet. Defendant retrieved the bullet and replaced it in the clip of the gun. Defendant was either holding the gun in his hand or on his lap when it discharged.

The gun fired a bullet which struck the victim in the head immediately behind the left ear.

The victim died as a result of this injury.

The crime of manslaughter requires that the actor “recklessly causes the death of another . . . .” UCA 76-5-205(1)(a). In this case, it is undisputed that defendant has caused the death of another. The court however, does not believe that there is probable cause to believe that defendant’s actions were reckless. Specifically, the term “recklessly” means that the actor acted:

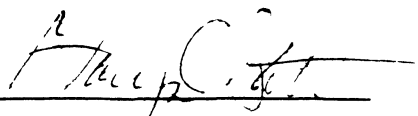
Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

UCA 76-2-103(3)

Having heard the evidence in this case, this court concludes that, as a matter of law, there is not probable cause that defendant was aware of but consciously disregarded a “substantial and unjustifiable risk” that his conduct might result in the death of another. This court also finds that any risk which did exist was not of such a nature and degree that its disregard would be a gross deviation from the standard of care that an ordinary person would exercise. Accordingly, this court finds that this matter should be dismissed.

IT IS SO ORDERED.

DATED: 12/3/01

  
District Court Judge